No. 195

In the Supreme Court of the United States

OCTOBER TERM, 1944

WILLIAM J. SOEDER AND EDWARD A. SOEDER,
PETITIONERS,
v.
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

INDEX

CITATIONS

600509—44——1

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OPINIONS BELOW

The District Court delivered no opinion. The opinion of the Circuit Court of Appeals (R. 643–644) is reported at 142 F. (2d) 236.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 20, 1944 (R. 643–644). A petition for rehearing was denied on May 22, 1944 (R. 659). The petition for a writ of certiorari was filed on June 26, 1944. The jurisdiction of this Court is invoked under Section 240

(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Petitioners, who are the sole stockholders and officers of a milk company, were convicted of procuring and counselling the preparation and filing of false and fraudulent tax returns of the company for the years 1936 and 1937, and of attempting to evade the company's taxes for such years. The questions apparently presented by the petition[1] are as follows:

1. Did the trial court err in refusing to charge the jury, as requested by petitioners, that the company, which kept its books on the accrual basis, was entitled to deduct for 1936 and 1937, if found to be ordinary and necessary business expenses, certain payments made to petitioners during those years to reimburse them for unlawful rebates given to customers of the company in 1933, 1934, and 1935?

2. Did the trial court err in charging the jury as a matter of law that the company was to be regarded as a corporation under Section 1001 (a) (2) of the Revenue Act of 1936, and hence was required to file income and excess-profits tax returns for the years 1936 and 1937?

[1] The petition contains no specific statement of the questions presented, as required by Rule 38 (2). While a failure to comply with this requirement may be sufficient reason for denying the petition (Rule 38 (2), and cases cited), we shall undertake to show that the petition also fails on the merits.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra,* pp. 11–13.

STATEMENT

Petitioners, William J. Soeder and Edward A. Soeder, are secretary-treasurer and president, respectively, of Soeder Sons Milk Company (R. 60, 63, 622), and each owns fifty per cent of the company's stock (R. 590). On May 12, 1943, they were convicted in the District Court for the Northern District of Ohio, Eastern Division, of procuring, counseling and advising the preparation and presentation of false and fraudulent tax returns of Soeder Sons Milk Company for the years 1936 and 1937, and of attempting to defeat and evade income and excess profits taxes of the company during such years (R. 24–25). Each was sentenced to imprisonment for one year and a day, and fined $5,000 and costs (R. 26–28). On appeal to the Circuit Court of Appeals for the Sixth Circuit, the convictions were affirmed (R. 643–644).

The evidence relating to each of the questions presented may be summarized as follows:

1. Soeder Sons Milk Company engaged in a general dairy business in Cleveland, Ohio (R. 589). From June 22, 1933, to July 1, 1935, there was in effect in Ohio a statute commonly called the Burk-Herner Act (Throckmorton's Ohio Code, Annotated (1940 Ed.), Sections 1080–1 to 1080–23, inclusive), which established a general scheme of

regulation of the milk industry in the state. The statute made unlawful the sale of milk at a price lower than the minimum prescribed by the Ohio Milk Marketing Commission. Petitioners violated the Act by secretly paying cash rebates to numerous customers of Soeder Sons Milk Company (R. 90, 94, 97, 362, 373, 383, 385, 387). During all of the years in which the Act was in effect, as well as in 1936 and 1937, the years involved in the indictment, some of the company's income was diverted directly to petitioners and was neither recorded as income on the company's books nor reported in its tax returns (R. 96–100, 604–605). The company's bookkeeper testified that from 1934 to 1938 varying amounts of cash receipts were segregated and paid directly to the petitioners as reimbursement to them for the rebates which they had paid to the customers (R. 96–100). Petitioners made no attempt to show the extent, if any, to which the income so diverted in 1936 and 1937 represented rebate payments for which petitioners had not been reimbursed in prior years.

The books of the company were kept on the accrual basis (R. 399).

Petitioners requested the trial court to charge the jury that in computing the income-tax liability for the taxable years involved, the jury should deduct all rebates and discounts which were found to be ordinary and necessary business expenses during such years, even though such payments

were made in violation of the Burk-Herner Act (Requests Nos. 8 and 9, R. 583–584). The court refused to give such an instruction, but charged the jury that petitioners were not guilty of fraud if they merely attempted to reduce taxes by honestly claiming deductions to which they believed the company was legally entitled (R. 556).

2. On January 2, 1922, petitioners and three others (Henry Soeder, Daisy Soeder, and Elmer G. Derr) executed articles of incorporation of "Soeder's Sons Company" for the purpose of carrying on a general dairy business in Cleveland (R. 638). These articles were cancelled by the Secretary of State of Ohio on February 15, 1924, for failure to pay franchise taxes, were reinstated on January 22, 1935, and were again cancelled for the same reason on February 15, 1926, without subsequent reinstatement (R. 359). Some time thereafter the company began to use the name "Soeder Sons Milk Company" instead of "Soeder's Sons Company" (R. 590). Petitioners intended to amend the articles of incorporation to show this change of name, but no such action was actually taken (R. 590). A state corporation franchise tax return for the year 1934 was filed by the company with the Secretary of State of Ohio in 1935, but was returned by him with the statement that he had no record of a corporation

by the name of "Soeder Sons Milk Company" (R. 418). A personal-property tax return for the year 1934 was filed with the Ohio Department of Taxation by the company as a corporation (R. 340). During 1935 the corporation's tax accountant discussed with a representative of the Bureau of Internal Revenue the question whether the company should continue to file corporate income-tax returns, and was advised that it should (R. 418). Petitioners frequently referred to themselves as officers and stockholders of the corporation (R. 63, 104, 108, 176, 377, 438–439, 589–590, 622), and they described the company as a corporation (R. 590, 622).

The trial court charged the jury as a matter of law that the Soeder Sons Milk Company was a corporation for tax purposes (R. 553), and refused to grant petitioners' requested charge that the corporate status of the company was a question of fact to be determined by the jury (R. 585).

ARGUMENT

1. The refusal of the trial court to give the requested instructions charging the jury to deduct the rebate payments if found to be ordinary and necessary business expenses was clearly correct on two separate grounds.

First, since the company kept its books on the accrual basis, any deductions for rebates, if allowable at all, were allowable only for 1933, 1934, and 1935, the years in which they were actually paid

to the customers and in which the sales to which they relate were made. The years involved in the indictment are 1936 and 1937. The Burk-Herner Act expired on July 1, 1935. No comparable statute was in effect during 1936 and 1937, and there is no evidence in the record of any rebate payments made in 1936 or 1937 or with respect to 1936 and 1937 sales.

Secondly, since the rebates were paid in violation of law, they were not deductible as ordinary and necessary business expenses under Section 23 (a) of the Revenue Act of 1936, Appendix, *infra,* p. 11. *Great Northern Ry. Co.* v. *Commissioner,* 40 F. (2d) 372 (C. C. A. 8), certiorari denied, 282 U. S. 855; *Burroughs Bldg. Material Co.* v. *Commissioner,* 47 F. (2d) 178 (C. C. A. 2); *Chicago, R. I. & P. Ry. Co.* v. *Commissioner,* 47 F. (2d) 990 (C. C. A. 7), certiorari denied, 284 U. S. 618; *Tunnel R. R.* v. *Commissioner,* 61 F. (2d) 166 (C. C. A. 8), certiorari denied, 288 U. S. 604; *Rugel* v. *Commissioner,* 127 F. (2d) 393 (C. C. A. 8); *Helvering* v. *Superior Wines & Liquors,* 134 F. (2d) 373 (C. C. A. 8); *Harden M. Loan Co.* v. *Commissioner,* 137 F. (2d) 282 (C. C. A. 10), certiorari denied, 320 U. S. 791. *Commissioner* v. *Heininger,* 320 U. S. 467, upon which petitioners principally rely, does not support their contention. The deduction permitted there was a lawful payment of attorneys' fees incurred in defending a business against a fraud order of the Post Office Department. In this case

the rebate payments constituting the alleged deductions were themselves unlawful.[2]

The only significance of the rebate payments was their bearing on the question whether petitioners honestly thought such payments were deductible, and were therefore not guilty of wilfully attempting to evade taxes. As has already been noted, however, the jury were properly instructed by the court on this question, and no complaint is made here in that regard.

2. The evidence in the record clearly shows that the business of Soeder Sons Milk Company was conducted as a corporation, and that petitioners referred to it as a corporation and described themselves as officers and stockholders thereof. No evidence was presented to the contrary. Since the facts were undisputed, the question of corporate existence—*i. e.,* the legal significance of such facts—was one of law to be determined by the court. See 8 Fletcher, Cyclopedia of Corporations, Sec. 3784, p. 79, Sec. 4061, p. 541.

Petitioners' contention that the ruling of the lower court on this point was erroneous is not founded on any evidence showing that the business was not conducted as a corporation. Rather,

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[2] In the *Heininger* decision this Court cited *Great Northern Ry Co.* v. *Commissioner*, *Burroughs Bldg. Material Co.* v. *Commissioner* and *Rugel* v. *Commissioner*, *supra*, with apparent approval as examples of the basic principle governing the nondeductibility of expenditures proscribed by federal or state policies.

it is based wholly on the supposition that the corporation's existence had been terminated as a legal consequence of the cancellation of its articles of incorporation by the Secretary of State of Ohio in 1926. The fallacy of petitioners' argument lies in the erroneous premise that the cancellation of the articles of incorporation for nonpayment of franchise taxes terminated the existence of the corporate entity. The Supreme Court of Ohio has held to the contrary. *Eversman* v. *Shipman Co.*, 115 Ohio St. 269; *Sweeny* v. *Driller Co.*, 122 Ohio St. 16. In construing Sections 5509 to 5513, inclusive, of the Ohio General Code, the court held in these cases that cancellation of the articles of incorporation by the Secretary of State for nonpayment of franchise taxes, pursuant to Section 5509, does not automatically terminate the existence of the corporation, and that even after such cancellation the final power to forfeit and annul corporate privileges and franchises rests in a court of competent jurisdiction to be exercised in a *quo warranto* proceeding.

Nor was the corporate existence terminated by the insertion of the word "Milk" in the name of the company, in view of the well-established principle that a change in name, even though unauthorized or legally insufficient, neither affects the continued existence of a *de jure* or a *de facto* corporation nor converts a *de jure* corporation into a *de facto* one. 8 Fletcher, Cyclopedia of Corporations, Sec. 3782, p. 78.

The District Court was wholly justified, therefore, in concluding that the company had the status of a corporation under state law. But, in any event, under Section 1001 (a) (2) of the Revenue Act of 1936, Appendix, *infra,* p. 13, the company would be taxable as a corporation even if it were only a *de facto* corporation or an unincorporated association. *Hecht* v. *Malley,* 265 U. S. 144; *Morrissey* v. *Commissioner,* 296 U. S. 344.

CONCLUSION

The decision below is correct. There is no conflict of decisions, and there is no occasion for further review. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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